

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-7096

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

PHILLIP DOUGLAS MILLER, ESQ.,
PLAINTIFF,

-AGAINST-

THE AMERICAN TELEPHONE & TELEGRAPH CO.
("AT&T"), JOHN DEBUTTS, ROBERT FLINT,
DONALD LAMONT, CYRUS HALPERN, RODERICK
AYA, MESSRS. CHRISTENSON, ANDERSON,
GAMMON, WORTHY, AND CERTAIN OTHER UNNAMED
EMPLOYEES OF AT&T,
DEFENDANTS

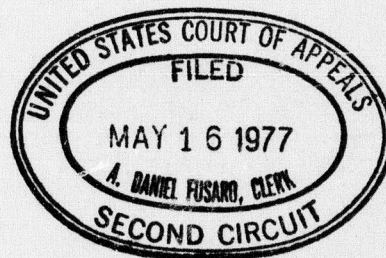
U.S. DISTRICT COURT DOCKET
NO. 76 CIV. 5462

U.S. COURT OF APPEALS (2ND CIRC.)
DOCKET NO. 77-7096

PLAINTIFF/APPELLANT'S BRIEF

B

P/S



PLAINTIFF/APPELLANT'S BRIEF

TABLE OF CONTENTS

I. Table of Cases	p. 2
II. Table of Authorities	p. 4
III. Statement of Issues	p. 5
IV. Statement of Case	p. 7
V. Statement of the Facts	p. 8
VI. Argument	p. 11
1st Amendment	p. 11
5th Amendment	p. 12
13th Amendment	p. 13
14th Amendment	p. 14
42 U.S.C. 2000-e, et seq.	p. 15
42 U.S.C. 1985(2) & (3)	p. 17
E.O. 11,246 & 41 CFR 1.12.803.1	p. 19
Denial of Preliminary Injunction	p. 20
NY Exec. Law Sects. 292.1; 296.1; and 297.9	p. 23
Dismissal of claims against individual Defendants	p. 24
VII. Summary	p. 26
VIII. Conclusion	p. 27
Appendix.	

TABLE OF CASES

- Ainslie v. Middendorf 381 FS 305 (D.C. Mass., 1974)
- A.T. Brod & Co. v. Perlow 375 F2d 393 (2d Cir., 1967)
- Bloodworth v. Oxford Village Townhouses, Inc. 377 FS 709 (N.D., Ga., 1974)
- Danbois v. New York Central Railroad Co. 12 NY2d 234 (Court of Appeals, New York, 1963)
- Drew v. Liberty Mutual Ins. Co. 480 F2d 69 (5th Cir., 1973)
- Farley v. Turner 281 F2d 131 (1966)
- Girard v. 94th St. & Fifth Ave. Corp. 530 F2d 66 (2d Cir., 1976)
- Grammenos v. Lemos 457 F2d 1067 (2d Cir., 1972)
- Hawaiian Telephone Co. v. State of Hawaii Dept. of Labor & Industrial Relations 378 FS 791(D.Ct., Hawaii, 1974)
- Hupert v. Board of Higher Education of the City of New York 420 FS 1087(1976)
- Jones v. Alfred Mayer 392 U.S. 409(1968)
- Kelly v. Board of Education of the City of Nashville 159 FS 272(1958)
- Keyer v. Civil Service Commission of the City of New York 397 FS 1362 (E.D., N.Y., 1975)
- Raskin v. University of Pennsylvania 386 FS 992 (E.D., Pa., 1974)
- Runyon v. McRary ____ U.S. ____, 96 S.Ct. 2586(1976).
- Schrank v. Bliss 412 FS 28 (D.Ct., Fla., 1976)
- State Corp, Comm. v. Wichita Gas Co. 290 U.S. 561(1934)
- Tramble v. Converters Ink Co. 343 FS 1350(D.Ct., Ill., 1972)

Union Management Corp. v. Koppers 366 F2d 199(2d Cir.,1966)

Washington Capitol Basketball Club, Inc. v. Barry 364 FS 1193(D.C.,
Calif., 1969)

414 Theatre Corp. v. Murphy 499 F2d 1155(2d Cir.,1974)

TABLE OF AUTHORITIES

1. 1st Amendment to the U.S. Constitution ___ 5; 11; 27; 28
2. 5th Amendment " " " ___ 5; 7; 12 ; 27; 28
3. 13th Amendment " " " ___ 5; 13; 14 ; 27; 28
4. 14th Amendment " " " 5; 7; 14 ; 27; 28
5. 41 Code of Federal Regulations 1.12.803.1 ___ 6; 19 ; 27; 28
6. 42 U.S.C. 1981 ___ 7; 8; 14; 15 ; 28
7. 42 U.S.C. 1982 ___ 6 ; 27; 28
8. 42 U.S.C. 1985(2) &(3) ___ 6; 17 ; 27; 28
9. 42 U.S.C. 2000-e, et seq. ___ 6; 7; 15 ; 27; 28
10. Executive Order No. 11,246 ___ 6; 19 ; 27; 28
11. New York Executive Law Sections 292.1; 296.1; and, 297.9 ___ 6; 7; 23; 27; 28.
12. New York CPLR 308 ___ 25
13. Federal rules of Civil Procedure 1 & 4(e) ___ 25

STATEMENT OF ISSUES

1. Were the following rulings of the Hon. Kevin Thomas Duffy clearly erroneous as a matter of law because his rulings ignored or rejected facts alleged which were deemed true as a matter of law for purposes of a motion to dismiss. #7 Record, 1-7. Appendix ("App.") p. 52. The rulings are stated in issue form:

1.1 Were Defendants' alleged acts illegal under the First Amendment clauses protecting freedom of speech and the right to petition the government for redress of grievances, in allegedly discriminating against me because I stated verbally and in writing that I objected to their acts of discrimination and in stating verbally and in writing that I would seek legal redress if the discrimination was not rectified?

1.2 Were Defendants alleged acts illegal under the Fifth Amendment clauses protecting against the deprivation of property without due process of law, in allegedly firing me in violation of the Company's own rules?

1.3 Were the Defendants' alleged acts illegal under the Thirteenth Amendment where the same facts allege acts illegal under 42 U.S.C. 1981?

1.4 Were the Defendants' alleged acts illegal under the Fourteenth Amendment clauses protecting against the deprivation of property without due process of law, and against the denial of equal protection under the law, for allegedly discriminating in hiring me, discriminating in the terms and conditions of my employment, and in

discriminatorily firing me?

1.5 Was the Hon. J. Duffy required as a matter of law to rule on whether the federal courts have jurisdiction over the Defendants' alleged acts of illegality under 42 U.S.C. 2000-e, et seq., by deeming the facts alleged by me to justify non-exhaustion of administrative remedies to be true for purposes of a motion to dismiss, and then determining as a matter of law whether the alleged facts were sufficient to justify non-exhaustion?

1.6 Were the Defendants' alleged acts of illegality under 42 U.S.C. 1985(2) and (3) erroneously dismissed by the Hon. J. Duffy for his reason that my complaint failed to allege conspiracy, and even if it did, on the basis that my allegations solely evidenced the implementation of a single AT&T corporate policy of discrimination?

1.7 Were Defendants' alleged acts illegal under Executive Order No. 11,246, and 41 C.F.R. 1.12.803.1, prohibiting discrimination in federal contracts, in allegedly discriminating in hiring me, in discriminating in the terms and conditions of my employment, and in discriminatorily firing me.

1.8 Was the Hon. J. Duffy's denial of my motion for preliminary injunction for his reasons that I did not allege facts sufficient to justify such relief, clearly erroneous as a matter of law?

2. Were the Defendants' alleged acts of illegality under 42 U.S.C. 1982 erroneously dismissed by the Hon. J. Duffy for his reason that 42 U.S.C. 1982 "applies to the sale or rental of real property", since 42 U.S.C. also protects the rights of U.S. citizens to hold personal

property, and my allegations include Defendants' discriminatory interference with the personal properties of my job, reputation, and profession?

3. Were the Defendants' alleged acts of illegality under New York State Executive Law Sections 292.1, 296.1, and 297.9 erroneously dismissed by the Hon. J. Duffy for his reason that these legal claims were not enforceable in federal court because the state law required enforcement of these laws through state agency proceedings with judicial review in state courts?

4. Was the Hon. J. Duffy's dismissal of all legal claims against the individual Defendants for his reason that service did not comply with the due process clauses of the 5th and 14th Amendments, clearly erroneous as a matter of law?

STATEMENT OF THE CASE

1. This case seeks enforcement of the laws against racial discrimination. I am an attorney and the plaintiff pro se in this action. This case involves my being hired under discriminatory and illegal circumstances, retaliation and discrimination against me in the terms and conditions of my employment, and discrimination in firing me. I filed a complaint in federal court alleging 24 legal claims, and I moved by Order to Show Cause for preliminary injunctive relief. Defendants moved to dismiss all my legal claims except those alleged under 42 U.S.C. 1981 and 42 U.S.C. 2000-e, et seq., and moved to dismiss all legal claims against the individual defendants. The Hon.

J. Duffy, in an Order dated February 3, 1977, denied my motion for preliminary injunction, dismissed the action against all the individual Defendants, and dismissed all legal claims except that under 42 U.S.C. 1981 and my common law claims for fraud, deceit, misrepresentation, breach of contract, mental distress, conversion of personal property, and trespass. This case is now on appeal from the above described dismissals and adverse rulings.

STATEMENT OF THE FACTS

All of my legal claims are based upon the facts summarized below:

1. That Defendants represented to me that I was being offered the job of Tax Attorney, when in fact there was no such position of Tax Attorney in the Comptroller's Dept. of AT&T.
2. I was prevented from acting as an attorney, e.g. not allowed to contact the Internal Revenue Service; informed I could not write an opinion.
3. That Defendants placed me in a position inferior in terms of salary, benefits, duties, and office space, to that of other attorneys employed by AT&T with comparable experience and qualifications.
4. That Defendants denied me the job responsibilities in the areas of investment credit, depreciation, and cost accounting, which they had represented I was to undertake in this new position.
5. That Defendants discriminated against me in job assignments by giving me useless and unnecessary work, assigning me to matters which were already completed, and forcefully keeping me on one assignment long after it was necessary.

6. That Defendants misrepresented that I was being hired in preparation for assuming the duties of Manager, Tax Research & Planning within 2-3 years.

7. That Defendants refused to grant me the minimum annual increments of \$3,000.00 per annum agreed to be effective over a 2-3 year period, and misrepresented my rights to other benefits.

8. That Defendants repeatedly violated AT&T's own Company rules in failing to give me required information about my job. Specifically, Defendants failed to give me a job description; failed to inform me of the evaluation process; and, failed to evaluate me despite my written requests that they evaluate me- in fact, 3 weeks before they were mandatorily obligated to evaluate me, they fired me.

9. That Defendants retaliated against me for complaining of discrimination. My first complaint was after reading an outline of job responsibilities prepared by Mr. Roderick H. Aya. The outline listed me as having none of the duties Defendants had agreed to ^{give} me, described in Para. 4 above; at the same time, the outline listed Ms. Barbara Josefowicz, a white, female attorney hired after me, as having those responsibilities. I informed Mr. Aya of this unfairness. The retaliation was immediate: Mr. Cyrus J. Halpern, on the next day, came into my office to criticize me about my "attitude", although prior to that time I had never before been criticized in any way for attitude or for any other reason; within days, I was put on an absolutely worthless assignment and kept on it for 2 weeks from the date of my verbal complaint.

10. That within two days of requesting leave of absence with pay for personal reasons because of the pressures on me, I was fired.

11. That the reasons given for firing me was my attitude and performance. However, no one criticized my attitude prior to my complaints of discrimination. And my performance could not have been the reason since my boss told me my first assignment, on capital contributions, was one of the finest analyses he had ever read, and furthermore, AT&T refused to evaluate me in violation of their own Company rules.

12. That another reason given for firing me was my "repeated absences". However, prior to the week before I was fired, I had taken less than one week's vacation, and I had been at AT&T for 8 months, and I was entitled to 3 weeks. The facts speak for themselves. Furthermore, by law AT&T was required to notify me in writing twice before they could fire me for being absent repeatedly. This was never done.

11. That the above treatment of me is explained by Defendants' central concern in hiring me to satisfy their government imposed quota to hire black persons, and total, demonstrated lack of concern in hiring me for a bona fide career position.

12. My factual allegations and proof are stated in greater detail in the following parts of the Record:

#1.p.4-15; Appendix 4-15.

#4.Affirmation, pp.1-5; Appendix, p. 2630.

#5, Memo. of LAW, p.4;6-7; Appendix, p. 36-39.

#7, Memo. of Law, p.1-3; Affirmation, p.2-3; Appendix, 52-57.

#8, Affirmation, p.1-11; Appendix, p. 59-67

ARGUMENT

ISSUE NO.1.1: DEFENDANTS' ALLEGED ACTS WERE ILLEGAL
UNDER THE FIRST AMENDMENT CLAUSES PROTECTING FREEDOM
OF SPEECH AND THE RIGHT TO PETITION THE GOVERNMENT FOR
REDRESS OF GRIEVANCES

1. I pleaded the following:
 - 1.1) That I was retaliated against and fired for saying and writing my complaints of discrimination.
 - 1.2) That I was retaliated against and fired for saying and writing I would sue them if they did not stop discriminating against me.
2. These allegations are contained in my amended complaint, #1 Record p.1;5-8. Appendix, 5-8.
3. These allegations were required by law to be treated as true for for purposes of a motion to dismiss. A.T. Brod & Co. v. Perlow 375 F2d 393 (2nd Cir., 1967).
4. The Hon. J. Duffy ruled that the "requisite governmental action" for application of the 1st Amendment was not alleged. MEMORANDUM AND ORDER OF KEVIN THOMAS DUFFY, D.J. dated February 3, 1977, at. pp.7-8. ("Order of J. Duffy"). Appendix, p.91-92.
5. This ruling is clearly erroneous as a matter of law. Jones v. Alfred Mayer 392 U.S. 409 (1968), and Runyon v. McRary 96 S.Ct. 2586 (1976) have made it clear that the Bill of Rights does not require federal or state governmental action to be applicable to private acts of discrimination. #5 Record \ ; Appendix 33-34.
6. Even if governmental action were still a prerequisite, which it is not, this requirement would still be met since AT&T's decision to hire

ME was mandated by a Consent Decree between the United States Government and AT&T, and AT&T violated the Consent Decree not only in hiring me, but in their treatment of me on the job, and in their manner of firing me. In Danbois v. New York Central Railroad Co. 12 NY2d 234 (Court of Appeals, N.Y., 1963), furthermore, the Court ruled that the Company rules of a public utility, established to protect the public interest, thereby acquire the characteristics of governmental law. 12 NY2d, at pp. 239-240.

7. The Affirmative Action Plan ("AAP") of AT&T, established pursuant to the Consent Decree to protect minorities from discrimination, is proof of the requisite governmental action.

8. It is illegal to fire a person for voicing complaints of discrimination, and in this situation, it was a violation of my right to freedom of speech. Furthermore, it is illegal to retaliate and to fire a person for stating he will exercise his right to legal redress if his employer refuses to cease its discriminatory acts, and in this situation, it was a violation of my right to petition the government for redress of grievances. The District Judge therefore erroneously dismissed my legal claim under the 1st Amendment.

ISSUE NO.1.2: DEFENDANTS'ALLEGED ACTS WERE ILLEGAL
UNDER THE FIFTH AMENDMENT'S CLAUSE PROTECTING AGAINST
THE DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF
LAW

1. I pleaded the following:

1.1) That I was fired and thereby deprived of my property interest in my job in violation of AT&T'S own company rules. #1 Record p.13;

Appendix 13.

1.2) That Defendants rifled my files, took my complete files on capital contributions, which was my personal property, and refused to return it. #1 Record 13; Appendix 13.

1.3) That Defendants paid over \$400.00 to the U.S. Government in withholding taxes against my specific, written instructions, immediately after firing me. Record & Appendix, supra.

1.4) That the manner in which I was fired, adversely affected and interfered with my reputation, profession and business. Record & Appendix, supra.

2. The Order of J. Duffy ruled that the "requisite governmental action" was not alleged to support this legal claim.

3. This ruling is clearly erroneous as a matter of law for the same reasons stated above under Issue No. 1.1. Paras. 3-7.

ISSUE NO 1.3: DEFENDANTS' ALLEGED ACTS WERE ILLEGAL UNDER THE 13TH AMENDMENT TO THE CONSTITUTION PROTECTING AGAINST INVOLUNTARY SERVITUDE

1. I pleaded the following:

1.1) That AT&T consciously and wilfully misled me into taking a job they needed to be filled by a black person for the purpose of satisfying their quota under their AAP, established under a U.S. Government Consent Decree. #1 Record 6; Appendix 6.

1.2) That Defendants retaliated against me for complaining of discrimination, and ultimately fired me for the same reasons. #1 Record 8-9; Appendix 8-9.

2. The Order of J. Duffy ruled that I failed to allege facts establishing involuntary servitude. #11 Record 8; Appendix 92.

3. This ruling is clearly erroneous on the law. The 13th Amendment is the constitutional authority for the Civil Rights Laws, including 42 U.S.C. 1981, et seq. Jones v. Alfred Mayer, supra. These laws particularized what Congress has determined to be involuntary servitude.

4. The Hon. J. Duffy has ruled that my legal claims under 42 U.S.C. 1981 was supported by my allegations. Since there were allegedly illegal acts under 42 U.S.C. 1981 which the Judge did not dismiss, then there must have been acts allegedly illegal under the 13th amendment.

ISSUE NO. 1.4: DEFENDANTS' ALLEGED ACTS WERE ILLEGAL UNDER THE 14TH AMENDMENT CLAUSES PROTECTING AGAINST THE DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW, AND AGAINST THE DENIAL OF EQUAL PROTECTION UNDER THE LAW.

1. I pleaded the following:

1.1) That AT&T has not fired white employees for requesting absence with pay for personal reasons. #1 Record 14; Appendix 14.

1.2) That AT&T has not discriminated against white employees in job status, position, assignments, or other terms and conditions of employment. Record & Appendix, supra.

1.3) That AT&T has not fraudulently induced white employees to accept employment under false pretenses. Record & Appendix, supra.

1.4) See also my pleadings under Issue No. 1.2, supra.

2. These allegations were required by law to be treated as true for

purposes of a motion to dismiss. A.T. Brod & Co., supra.

3. The Order of J. Duffy ruled that the "requisite governmental action" was not alleged to support this legal claim.

4. This ruling is clearly erroneous on the law for the same reasons stated above under Issue No. 1.1, Paras. 5-7.

ISSUE NO. 1.5: DEFENDANTS ALLEGED ACTS WERE ILLEGAL UNDER 42 U.S.C. 2000-e, et seq, AND FEDERAL COURT HAS JURISDICTION OVER THESE LEGAL CLAIMS BECAUSE PLAINTIFF PLEADED SUFFICIENT FACTS TO JUSTIFY NON-EXHAUSTION

1. I pleaded the following:

1.1) Discrimination in hiring, terms and conditions of employment, and firing. #1 Record p.1;5;7;9.

2. There is no question that my allegations were sufficient to state a cause of action under 42 U.S.C. 2000-e, et seq. A.T. Brod & Co., supra.

3. The only issue is whether I was required to exhaust administrative remedies, and the Order of J. Duffy ruled that "Plaintiff has conceded-ly failed to exhaust/^{the} administrative avenue of relief, a prerequisite to suit in the federal courts." #11 Record 10; Appendix 94.

4. This ruling was clearly erroneous as a matter of law, for the following reasons:

4.1) The federal courts have jurisdiction over my Title VII claims since it already has subject matter jurisdiction over my claims of discrimination under 42 U.S.C. 1981.

4.2) The Hon. J. Duffy has ruled that my claims under state common law are subject to pendent federal court jurisdiction, on the basis

that the state claims arise out of the same facts as the federal claims. There is therefore no basis whatsoever for dismissing other federal statutory claims arising out of the same facts as the above described federal and state claims which were not dismissed.

4.3) I am not required to exhaust administrative remedies where such remedies are inadequate, futile, or there is good cause to justify non-exhaustion. Hupert v. Board of Higher Education of the City of New York 420 FS 1087 (1976), at p. 1104; State Corp. Comm. v. Wichita Gas Co. 290 U.S. 561 (1934); Kelly v. Board of Education of the City of Nashville 159 FS 272 (1958); Farley v. Turner 281 F2d 131 (1966).

5. I alleged the following facts, in papers submitted to the Hon. J. Duffy, at his request, (~~#5~~Record 1-9; Appendix 33-41), to justify non-exhaustion:

5.1) On September 28, 1976 (which was within 3 weeks of my being fired, and was obviously during the time I was deciding what action to take), the Comptroller General of the General Accounting Office published a report to the Congress disclosing the severe deficiencies of the Equal Employment Opportunity Commission ("EEOC") in failing to enforce the discrimination laws. #5 Record p.3-5; Appendix 35-37. The report disclosed that:

- a) The EEOC has had a minimal effect on discrimination.
- b) The waiting period to resolve a complaint is between 2-7 years.
- c) EEOC litigates 1% of all cases it cannot settle.
- d) minorities and women continue to be concentrated on the bottom.
- e) As of August, 1974, AT&T was in widespread noncompliance with the terms of its Consent Decree with the Government.

5.2) In September, 1976, prior to reading the Report, I spoke to Mr. Joseph Frusteri, the person at the EEOC in charge of AT&T's compliance with the Consent Decree. Mr. Frusteri said he would talk to Ed Anderson, an Equal Employment Officer ("EEO") at AT&T. The fact is, Ed Anderson personally tried to pressure me to drop my complaints against AT&T, and was powerless to help me when I came to him for assistance.

5.3) For the above reasons, I saw no reason whatsoever for filing a complaint with any federal, state, or local agency, especially since EEOC does not, according to MR. Frusteri, defer to local agencies in telephone company discrimination cases.

6. By law, the Hon. J. Duffy was required to rule on the sufficiency of these allegations to determine whether exhaustion was properly avoided on these facts, before he could determine that my Title VII claims were dismissable. A.T. Brod & Co., supra.

7. Defendants completely conceded jurisdiction under Title VII. There was therefore no basis to rule against me on an unopposed factual question. #6 Record, 1-10; Appendix 42-51.

ISSUE NO. 1.6: DEFENDANTS' ALLEGED ACTS WERE ILLEGAL UNDER 42 U.S.C. 1985(2) and (3)

1. I pleaded the following:

1.1) Mr. John DeButts, Chairman of the Board of AT&T, was made aware of the discrimination against me by letter, and did nothing.

1.2) Mr. Robert Flint, Vice-President & Comptroller of AT&T, (who I spoke to after Mr. Aya fired me, and asked to reconsider the decision), made me feel that it was unacceptable to be on AT&T's payroll and alsobe suing AT&T.

- 1.3) Ed Anderson and Bea Worthy, the EEO Officers of AT&T, pressured me to drop my complaints or quit.
- 1.4) Messrs. Halpern and Aya were the most actively involved in the discrimination against me, since they were the ones most directly responsible for hiring me, and were my immediate superiors.
- 1.5) Mr. Donald Lamont, was Mr. Halpern's, and Mr. Aya's supervisor, and he also engaged in illegally discriminatory acts against me.
- 1.6) Those who supervised the EEO officers, some of whom are named Defendants, were integrally involved in retaliation after I submitted a written complaint of discrimination. #1 Record 10; Appendix 10.
2. The Order of J. Duffy ruled that no violation of this statute was shown since (1) the complaint was "totally devoid of allegations of conspiracy", and (2) assuming conspiracy was alleged, none exists as a matter of law if "the acts complained of represent implementation of a single policy making body, and (3) "it does not appear that the acts alleged were other than the implementation of a single AT&T policy."
3. Taking the complaint as a whole, and the above allegations, it is clear that the alleged facts support a claim of conspiracy. A.T. Borod & Co., supra.
4. The Hon. J. Duffy concluded that the alleged discrimination represented a single AT&T policy, thus no conspiracy existed as a matter of law. Girard v. 94th St. and Fifth Ave. Corp. 530 F2d 66 (2d Cir., 1976).
5. Girard is distinguishable, because on the facts there was a single

governing body establishing policy in its official capacity as the Board of Directors of the Company. Here, the written policy of AT&T prohibits discrimination, and was violated by the acts of the individual Defendants, and those employees of AT&T with the power to bind the Corporation.

6. Additionally, as stated in Raskin v. University of Pennsylvania 386 FS 992 (E.D., Pa., 1974), where the employees of a Corporation engage in "continuing and varied instances of discrimination and harassment contrary to [the organization's] policy", then there is an alleged conspiracy. This case is cited in Girard. Thus, if anything Girard, by its own language and holding would support my claim. Furthermore, it would be unjust for the legal fiction of a corporation to be used to cover up wholesale illegality embarked on by individuals.

ISSUE NO. 1.7: DEFENDANTS ALLEGED ACTS WERE ILLEGAL UNDER
EXECUTIVE ORDER NO. 11,246; 41 C.F.R. 1.12.803.1

1. I alleged in my pleadings and moving papers, the following:
 - 1.1) That I worked on the legal tax aspects of contributions in aid of construction, which represents contributions by the federal government to the capital of AT&T. #7 Record 4; Appendix 55.
 - 1.2) That such contributions are found in many contracts between the U.S. Government and AT&T, and, for purposes of the statute, I therefore worked on such contracts. #7 Record 4.
 - 1.3) That I am a third party beneficiary to such federal contracts. #1 Record 11; Appendix 11.

2. The Order of J. Duffy ruled that these laws are not "relevant in light of the issues raised in the complaint."
3. This is clearly erroneous on the law. The only real issue is whether I exhausted my administrative remedies.
4. Upon information and belief, there has been minimally, if any, effective enforcement of this law; in fact, the administrative procedures are a brick wall between a complainant and his rights.
5. Nonetheless, the federal courts have the equitable power to fashion appropriate relief to rectify the violations of federal laws, when the remedy at law is inadequate. Drew v. Liberty Mutual Ins. Co. 480 F2d 69 (5th Cir., 1973)

ISSUE NO. 1.8: THE HON. J.DUFFY'S DENIAL OF MY MOTION
FOR PRELIMINARY INJUNCTION WAS CLEARLY ERRONEOUS ON
THE FACTS ALLEGED AND PROOF INTRODUCED

1. At the hearing on the motion for preliminary injunction, in large part, the evidence I introduced could have been more appropriate.
 2. Nonetheless, I did introduce the following evidence in my Affirmation dated January 18, 1977:
 - 2.1) That Defendants violated their own Company rules in firing me. I stated in great detail exactly which rules were violated.
 3. It is well settled that the violation of one's constitutional rights constitutes irreparable injury as a matter of law. 414 Theatre Corp. v. Murphy 499 F2d 1155 (2d Cir., 1974). *That case involved an injunction to prevent the closing of a pornography house, in violation of the First Amendment. I find it inconceivable that purveyors of pornography can find it easier to obtain injunctive
- * Keyer v. Civil Service Commission of the City of New York 397 FS 1362(E.D., N.Y., 1975).

relief for violation of their constitutional rights from the federal courts, than a black person can when his constitutional rights have been violated.

4. The Hon. J. Duffy chose to refer to the undisputed evidence contained in my Affirmation as "conclusory allegations", but the fact remains it is still evidence. The only thing I did not do was xerox the rules I had summarized and submitted the copies to the Court, which could easily have been done since the rules are in my possession.

5. Because my constitutional rights had been violated, I demonstrated to a certainty that I would succeed on the merits. For this reason, and for the following, injunctive relief should have been granted:

5.1) The law is clear that where Plaintiff is suffering or will suffer serious financial injury, injunctive relief is appropriate. Schrank v. Bliss 412 FS 28 (D. CT., Fla., 1976); Bloodworth v. Oxford Village Townhouses, Inc. 377 FS 709 (N.D., GA., 1974); Ainslie v. Middendorf 381 FS 305 (D.C. Mass., 1974). The telephone company itself has made this argument in Hawaii and obtained injunctive relief where the potential injury was purely economic. Hawaiian Telephone Co. v. State Dept. of Labor & Industrial Relations 378 FS 791 (D.Ct., Hawaii, 1974)

5.2) My claims raised substantial or doubtful questions which required a trial to resolve. See 8 Record 9-11; Appendix 67-69.

5.3) The balance of hardships obviously tip decidedly in Plaintiff's favor. #8 Record 9-11; Appendix 67-69

5.4) the injunction would have preserved the status quo. Washington Capitol Basketball Club, Inc. v. Barry 364 FS 1193 (D.C. Calif., 1969); Union Management Corp. v. Koppers 366 F2d 199 (2d Cir., 1966). It was clearly erroneous on the law to state that injunctive relief was inappropriate because I was fired and my relationship with AT&T no longer exists. If this were true, then a fired employee would have no right of reinstatement which is not the case.

6. I requested relief to require reinstatement to another position which is unquestionably within the power of the federal courts to fashion as a remedy. I sought this relief because it was the fair and appropriate form of relief under the circumstances. The same applies to my entirely reasonable, understandable, and logical request for a contract of retainer as relief in the alternative. This relief may appear novel, but it fits the circumstances of this case exactly. I am a professional, and I had an oral contract with AT&T to provide professional services as an employee to AT&T. They showed no respect whatsoever to that agreement, going so far as to break the law. AT&T has an obligation under the law to provide business to minority enterprises. AT&T effectively forced me to start my own business. With the millions of dollars AT&T receives from minorities in this country, I do not believe they have a single black lawyer on retainer. This court has the power to reform my oral agreement to that of a contract of retainer, and it should require that it be done in this case.

7. I object to being forced to bear the severe pressures of the risky

financial venture of private practice, when it was Defendants' illegal acts that created the problem. I am to this moment still in a position to declare bankruptcy, and it is offensive that Defendants can continue to benefit from it, while I suffer from seeking the protection of the law. Additionally, assuming 6 months from now, by virtue of my own hard work, I manage to make a viable venture of my law practice, is there any justification whatsoever for making Defendants, who have forced suffering and hardship on me, benefit from what I have managed to do to overcome their illegal acts. I perceive the remedy of a preliminary injunction as the only way in which Defendants can be prevented from continuing to enjoy the fruits of their own illegal acts.

ISSUE NO. 3: DEFENDANTS ALLEGED ACTS WERE ILLEGAL
UNDER NY EXECUTIVE LAW SECTIONS 292.1; 296.1, AND
297.9

1. The Order of J. Duffy ruled these legal claims dismissed on the basis that they were not enforceable in federal court since they are parts of an "administrative scheme" administered by the State Division of Human Rights, with judicial review in State Courts. # 11 Record//; Appendix 95.
2. There is no legal basis whatsoever for denying federal court jurisdiction to these state law claims of discrimination. The District Judge was incorrect as a matter of law in ruling these claims unenforceable in federal court. Section 297.9 of the NY Executive Law states that the complainant has the choice of electing an agency forum or a court forum in a court of any appropriate jurisdiction.

Furthermore the statute grants "such other remedies as may be appropriate". There is absolutely no requirement that an agency proceeding be initiated before court action can begin.

3. The Hon. J. Duffy ruled that my common law claims under state law arising from the same facts creating the illegality under New York State statutory law, were cognizable by this Court. There is therefore no basis for denying these statutory claims jurisdiction to be heard by this forum.

4. Although I have not appealed the dismissal under the 10th Amendment, I find it necessary to point out that the above state statutory laws were enacted by authority of the 10th Amendment. Consequently, the 10th Amendment was violated when these laws were violated.

ISSUE NO.4: THE DISMISSAL OF ALL CLAIMS AGAINST THE
INDIVIDUAL DEFENDANTS WAS CLEARLY ERRONEOUS AS A
MATTER OF LAW

1. I obtained a Court Order authorizing the following method of personal service: AT&T was authorized by the Order of Court to receive the summons on behalf of the individual Defendants, through an agent authorized to receive service on behalf of AT&T. Such agent was then required to deliver the summons and complaint to an employee unrelated to the action who would then serve the papers personally on each individual Defendant. #2 Record 1; Appendix 22.

2. In my affidavit in support of the motion, I stated that I did not know the residence addresses of the individual Defendants, and they were all employees of AT&T and this procedure would save time, and avoid unnecessary hardship and difficulty. #2 Record 2-3; Appendix 23-24.

3. The Order of J. Duffy dismissed all claims against the individual Defendants on the basis that the Court Order appointing a process server in effect appointed AT&T as process server on the individual Defendants, and so violated CPLR 308(5) since (1) the individual Defendants did not authorize AT&T to be agent to receive process; and (2) none were personally served consistent with the requirements of due process.

4. This is clearly erroneous on the law. FRCP 4(1) states that service of process can be made by delivering the summons and complaint to an agent authorized by appointment or bylaw to receive service. Here, AT&T was appointed by law, pursuant to the Court order, to receive service. Thus, the service was perfectly valid, It is indisputable that this Court has the power to require service in this manner.

5. The essential constitutional requirement of due process in regard to service of process is notice. There is no question at all that Defendants received notice. All are employed by AT&T, and each individual Defendant has the same attorneys representing them, who are also employees of AT&T.

6. I had no way of knowing the home addresses of each individual Defendant short of discovery. The procedure chosen was the simplest and least expensive method which would fully inform them of the action against them, FRCP 1.

7. Under FRCP 4(e), if an Order of Court provides for service on a party not an inhabitant or found within the state, service is proper

when made in compliance with the procedure stated in the Order. Thus, if Defendants are complaining that there was not personal service, then they are estopped from doing so, since they can not use as a defense an illegality they were responsible for creating. They were required by the Court Order to see that the papers were personally served.

8. In Grammenos v. Lemos 457 F2d 1067 (2d Cir., 1972), the Court ruled that dismissal after one attempt at service was unwarranted where on the facts proper service may still be obtained. At. pp. 1070-71. There is no question that if service is deemed defective on this appeal, that I can still obtain personal service, although with much greater difficulty.

9. The real effect of the service method chosen was to have messengers of AT&T deliver the papers to them. Given present day reality, it is inconceivable that this can be called unconstitutional. Consequently, the Hon. J. Duffy's wholesale dismissal of all legal claims against the individual Defendants without at least granting leave for further attempts at service was totally improper on the law.

SUMMARY

The central issue is whether the judiciary is going to enforce the laws against discrimination against these Defendants, who have shown themselves to be disrespectful of these laws, to ensure that when AT&T hires minorities pursuant to government law, contract, and court order, they do not illegally hire minorities into jobs inferior to those held by whites with comparable qualifications, and do not place minorities into jobs with no real career or future.

CONCLUSION

The relief sought is as follows:

1. An Order reversing the Hon J. Duffy's dismissal of the following legal claims:
 - 1.1) Alleged acts illegal under the First Amendment to the Constitution.
 - 1.2) Alleged acts illegal under the Fifth Amendment to the Constitution.
 - 1.3) Alleged acts illegal under the Thirteenth Amendment to the Constitution.
 - 1.4) Alleged acts illegal under the Fourteenth Amendment to the Constitution.
 - 1.5) Alleged acts illegal under 42 U.S.C. 2000-e, et seq.
 - 1.6) Alleged acts illegal under 42 U.S.C. 1982 & 1985(2) and(3)
 - 1.7) Alleged acts illegal under Executive Order No. 11,246, 41 C.F.R. 1.12.803.1.
2. An Order reversing the denial of preliminary injunctive relief against Defendants, requiring that Defendants reinstate Plaintiff as an employee of AT&T, and requiring that Defendants transfer Plaintiff to the Tax Legal Dept. of AT&T, and requiring that such reinstatement and transfer to be under written agreement with terms that are fair and just. In the alternative, an Order requiring the The corporate Defendant AT&T to contract with Plaintiff for legal services under terms that are fair and just.

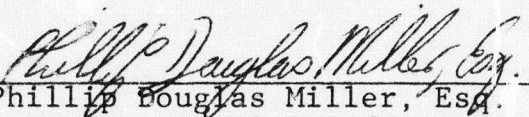
3. An Order reversing the Hon. J. Duffy's dismissal of all the claims that Plaintiff has appealed from relating to the individual Defendants, and reinstating those claims not appealed from.
 4. An Order directing that summary judgment be entered on the issue of liability under the 1st Amendment, the 5th Amendment, under the 13th Amendment, under the 14th Amendment, under 42 U.S.C. 2000-e, et seq., under 42 U.S.C. 1985(2) and (3)*, under Executive Order No. 11, 246, and 41 C.F.R. 1.12.803.1, under New York Executive Law Sections 292.1; 296.1; and, 297.9, and under the following common law claims under state law: fraud, deceit, misrepresentation, breach of contract, and mental distress., on the basis of this single, uncontested, indisputable, and uncontroverted fact: that AT&T fired me in violation of the Company's own rules established by Court Ordered agreement with the U.S. Government.
 5. An Order directing that the District Judge below treat Defendants' motion to dismiss under FRCP Rule 12(b)(6) as a motion for summary judgment under FRCP Rule 56, as required by FRCP Rule 12, and directing that all other claims not subject to the summary judgment order above, be set for a hearing at the earliest practicable date.
 6. An Order directing the Chief Judge of the District Court, pursuant to 42 U.S.C. 2000e-5(f)(4), to assign a Judge to this case.
 7. An Order directing that the Federal District Judge so designated, pursuant to 42 U.S.C. 2000e-5(f)(5), assign this case for a hearing subject to the Order above in Para. 5, at the earliest practicable date and to cause the case to be in every way expedited, and directing that if the designated Judge has not scheduled the case for trial
- * And also 42 U.S.C. 1981 and 1982.

within 120 days after issue has been joined, that within 10 days after the expiration of the above time period a special master be appointed pursuant to FRCP Rule 53, and directing that in the event a special master is appointed that Defendants shall bear the full cost and expenses of the Special Master.

8. That Defendants be directed to pay all costs and expenses of this appeal, plus such other relief as this Court deems appropriate.

Dated: May 13, 1977

Respectfully submitted,


Phillip Douglas Miller, Esq.
Attorney and Plaintiff Pro Se
434 East 52nd St., Suite 1A,
New York, New York 10022
(212) 355-2482

To: James A. DeBois, Esq.,
Saul Scheier, Esq.,
Clarence M. Dunnaville, Esq.
Attorneys for Defendants
American Telephone & Telegraph Co.,
195 Broadway,
New York, New York 10007

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
COUNTY OF _____ SS:

JOAN HARRISON being duly sworn, deposes
and says: deponent is not a party to the action, is over 18 years of
age and resides at 2016 Albemarle St. Bklyn P.N.Y.

On 5/16/77 1977, deponent served the within papers
upon James Debois

Attorney(s) for Defendants in this action, at
Atty 1, 195 Broadway, N.Y., N.Y.

being the address designated by said Attorney(s) for that purpose
by depositing a true copy of same enclosed in a post-paid properly
addressed wrapper, in a --post office-- official depository under the
exclusive care and custody of the United States Postal Service within
the State of New York.

Joan Harrison

Sworn to before me on 5/16/77

Phillip D. Miller
PHILLIP D. MILLER
Notary Public, State of New York
No. 4634142
Qualified in New York County
Commission Expires March 30, 1978